In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 714

OCEAN DRILLING & EXPLORATION COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-32a) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 F.P.C. 283 and 682.

JURISDICTION

The judgment of the court of appeals was entered August 14, 1964 (Pet. App. 33a). On November 6, 1964, Mr. Justice Black granted an extension of time for filing a petition for certiorari until November 23, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Where a court of appeals has invalidated a Federal Power Commission order granting an unconditional certificate of convenience and necessity and, on remand, the Commission conditions the certificate so as to require an initial price lower than the applicant's contract price, may the Commission require refunds of excess amounts collected for deliveries made under the original invalid certificate?

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in the petition at pages 1a-2a.

STATEMENT

The orders set aside by the court below were issued by the Commission on July 17, 1963, to correct a series of invalidated orders issued in 1959 granting unconditioned certificates of public convenience and necessity for sales by 42 producers of gas in South

Louisiana. The sales contracts, executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[1] Without awaiting the results of court review, the producers had accepted those certificates, commenced their deliveries, and collected at the contract prices throughout the review proceedings which resulted in the invalidation of the certificates.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[2] but this Court summarily reversed [3] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *P.S.C. of New York (CATCO)*, 360 U.S. 378. The other four courts of appeals thereupon reversed simi-

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[1] *Texas Gas Transmission Corp. (Hope Natural Gas Co.)*, Opinion No. 327, 22 FPC 378, 386-389, rehearing denied, 22 FPC 657; *The California Co. (United Gas Pipe Line Co.)*, 22 FPC 252, rehearing denied, 22 FPC 653; and *The Superior Oil Co. (Transco)*, 22 FPC 369, rehearing denied, 22 FPC 655; *Sun Oil Co. (United Gas Pipe Line Co.)*, 22 FPC 351, rehearing denied, 22 FPC 654, and *Sunray Mid-Continent Oil Co. (Transco)*, 22 FPC 361, rehearing denied, 22 FPC 652.

[2] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865 (C.A.3), vacated *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[3] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

lar Commission orders and remanded the proceedings to the Commission.[4]

The Commission subsequently instituted an area rate proceeding for South Louisiana and consolidated the remanded cases with that proceeding (R. 376). While denying motions of the consumer intervenors which would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[5] When it became apparent that

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[4] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9) certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission* and *Shell Oil Co.* v. *Public Service Commission*, 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A.10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A.5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A.5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[5] The particular case involving the present petitioner was *Texas Gas Transmission Corp., supra*, 22 FPC 378 and 657, reversed, *Public Service Commission of New York* v. *Federal Power Commission, supra*, 287 F. 2d 146 (C.A.D.C.), certiorari denied, 365 U.S. 880 and 882.

[6] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order

decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[7] The examiner ruled that the proper standard for determining the initial prices which would serve the public convenience and necessity was the general level of prices under contracts roughly contemporaneous with petitioners' and free of the infirmities which led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant to this issue voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

He concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable)

(*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[7] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (March 31, 1963).

and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).[8]

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases which might trigger "favored nations" clauses in a great many other contracts, the Commission ordered a moratorium on all price increases in excess of 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

On review, the court below held that the Commission erred in refusing to consider the economic evidence proffered by the producers and in prescribing the temporary moratorium on rate increases. Although it sustained the Commission's authority to order refunds, the court ruled that such refunds are to be measured not by the initial price fixed in the certificate, but by a "just and reasonable" rate as ultimately determined in proceedings under Sections 4 and 5 of the Act.

Three petitions for certiorari have been filed upon behalf of the Commission[9] and local distributor con-

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[8] He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket R-199), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable and it is not here in issue.

[9] *Federal Power Commission* v. *Callery Properties, Inc., et al.*, O.T. 1964, No. 756.

sumer representatives[10] for review of the rulings that the Commission erred in (1) conditioning the certificates upon the producer's acceptance of "in-line" prices and excluding cost and other economic evidence; (2) imposing a temporary moratorium on the filing of rate increases above a designated level; and (3) measuring refunds by reference to the certificate's initial price. The present petition seeks review of the court's ruling that the Commission had authority to order refunds, irrespective of their measure.

DISCUSSION

As we pointed out in seeking certiorari to review other aspects of this same judgment (No. 756, Pet. 14), the decision of the court below, insofar as it relates to refunds, is of limited importance since it is in terms confined to situations in which there has been a previous decree invalidating a Commission certificate. We suggested, however, that the question which we raised as to the proper measure of refunds (our question 3) did merit review in conjunction with the major questions (questions 1 and 2) also presented.[11]

Although we believe that the court below was quite correct in holding that the Commission was empow-

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[10] *United Gas Improvement Co., et al.* and *Public Service Commission of New York* v. *Callery Properties, Inc., et al.*, O.T. 1964, Nos. 671 and 678.

[11] These involved the validity of the "in-line" standard employed by the Commission in making a price determination and the Commission's power to condition the grant of a certificate upon a temporary moratorium on rate increases.

ered to order refunds in order to rectify its earlier error as determined in the course of prior judicial review, we acquiesce in a grant of the instant petition if this Court decides to grant review of question 3 as presented in the petition of the Federal Power Commission. Obviously the question of the Commission's power to order refunds in the situation presented by this case is closely related to the question which we have raised as to the proper measure of the refund obligation. If the one is reviewed, it would seem clearly appropriate to review the other as well.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

JOSEPHINE H. KLEIN,
Attorney,
Federal Power Commission.

DECEMBER 1964.

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